## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

### Point I.

**The appeal to the Circuit Court was properly taken as of right.**

a. The allowances appealed from are not allowances as compensation for services rendered in a corporate reorganization proceeding under the Bankruptcy Act and regulated by Chapter X, Article XIII of the Bankruptcy Act.

b. The accounting proceeding below is not a proceeding in bankruptcy—it is a controversy arising out of a reorganization proceeding and supplementary thereto.

c. The allowances awarded below are allowances for costs taxable as between solicitor and client to enforce the attorney's charging lien on the proceeds of a cause of action enuring to the benefit not only of his client but to others.

d. The case of *Dickinson v. Cowen,* 309 U. S. 382 is inapplicable to the case at bar.

*a.*

A reading of Article XIII of Chapter X of the Bankruptcy Act, comprising sections 241 to 259 inclusive, clearly demonstrates that the compensation and allowances therein provided for are for officers of the Court, the attorneys for the debtor or petitioning creditors, other parties to the proceedings and creditors and stockholders and their attorneys, for services rendered "in a proceeding under this Chapter," obviously meaning services in connection with the administration of the bankruptcy estate in *custodia legis,* and in relation to the proposal of a plan of reorganization, its modification, acceptance or rejection; the confirmation of the plan or its rejection; and if the plan is con-

firmed, the distribution of the estate or its return to the debtor in accordance with the terms of the plan. When the Court confirms the plan and it is made effective and executed and consummated by a distribution of the property affected by the plan, and the Trustees of the Debtor, pursuant to the Court's order have transferred all their rights in and to the debtor's property to a new corporation formed pursuant to the plan, there no longer remains any bankruptcy estate in *custodia legis;* the confirmed plan superseded the bankruptcy reorganization proceeding; the powers of the trustees of the debtor terminate, notwithstanding any "catch all" reservation by the Court of jurisdiction to give such further authorizations and directions as may be necessary to make effective, consummate or carry out the plan or an order of the Court, or the failure to enter an order formally discharging the reorganization trustees and closing the estate.

In re *Camden Rail & Harbor Terminal Corp.,* 35 Fed. Supp. 862;
*Mallow Hotel Corporation,* 29 Fed. Supp. 931;
*Bell* v. *Roberts,* 112 F. (2d) 585;

The effect of the acceptance and confirmation of a plan and its consummation by the transfer of the "bankruptcy estate", as provided by the plan, is the same as that of a confirmation of a composition under the former Section 12 of the Bankruptcy Act, which provided for compositions, and the provisions of Section 70 (f), as it read prior to the enactment of the Chandler Act.

Section 70 (f) formerly read:

> "Upon a confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him."

Under these provisions this Court held in *Cumberland Glass Co.* v. *DeWitt,* 237 U. S. 407, that the bankruptcy pro-

ceeding was superseded by the composition, and in *Nassau Smelting & Refining Works* v. *Brightwood Bronze Foundry Co.*, 265 U. S. 269, 271, 44 S. Ct. 506, 507, 68 L. Ed. 1013, it said:

> Composition is a settlement by the bankrupt with his creditors. In a measure, the composition supersedes, and is outside of the bankruptcy proceedings. *Cumberland Glass Co.* v. *DeWitt*, 237 U. S. 447, 454, 35 S. Ct., 636, 59 L. Ed. 1042. It originates in a voluntary offer by the bankrupt, and results in the main from voluntary acceptance by his creditors.

By the Chandler Act, Section 12 of the Bankruptcy Act has been elimited and Chapters X and XI, XII, XIII and XIV have been added to the Act and Section 70 (i), which replaces the former Section 70 (f) reads:

> Upon the confirmation of an arrangement or plan, or at such later time as may be provided by the arrangement or plan, or in the order confirming the arrangement or plan, the title to the property dealt with shall revest in the bankrupt or debtor, or vest in such other person as may be provided by the arrangement or plan, or in the order confirming the arrangement or plan.

By a parity of reasoning then, upon the confirmation of the plan of reorganization of Prudence Bonds Corporation, property and property rights, claims and choses in action, which pending the reorganization were vested in the debtor's trustees, and which were not reorganized, revested by operation of law in the debtor or such other party as provided in the plan. The plan, like the former composition, superseded the bankruptcy proceeding, and the enforcement of any rights accruing under the plan or reserved and preserved from the operation of the plan would be outside of and not a part of the bankruptcy proceeding.

*Berl* v. *Crutcher*, 60 Fed. (2d) 440.

It would follow, therefore, that the allowances awarded in connection with the accounting proceedings below are not allowances for services rendered in a proceeding under Chapter X of the Bankruptcy Act and compensable out of the "Bankruptcy estate" within the provisions of Sections 241 to 250 inclusive of the Act.

*b.*

The accounting proceedings below, while not proceedings in a bankruptcy reorganization, nevertheless are controversies arising out of the reorganization proceedings over which the Federal Court and the State Court had concurrent jurisdiction. The Circuit Court recognized this to be so, for in the jurisdictional appeal, 105 Fed. (2d), 130, it suggested that the District Court, in its discretion, might not retain jurisdiction and might permit the accounting actions to be in another forum, the State Court or some other Federal Court, which, of course, would not be the case if such accountings were proceedings in bankruptcy over which the Bankruptcy Court had exclusive jurisdiction; and again, the Circuit Court recognized that such accountings were not proceedings in the bankruptcy reorganizing of the debtor in the case of *Manufacturers Trust Company* v. *Kelby,* 125 Fed. (2d) 650, wherein it stated that allowing the reorganization trustees to intervene in the accounting proceedings was a matter "for the decision of the District Judge within the discretion vested in him by Rule 24, (b) (2)." If such accountings were proceedings in the bankruptcy reorganization, the debtor's trustees would be necessary parties—in fact, the only necessary parties, and their right and duty to appear would be found within the provisions of the Bankruptcy Act and would not be predicated on a discretion lodged in the District Court by a rule extraneous to said Act, and the allowance of any counsel fees to petitioner Samuel Silbiger would be indefensible.

*c.*

The compensation and allowances awarded below were for services rendered in accounting proceedings whereby the underlying security for the outstanding bonds in the five series with respect to which the accounts were rendered were substantially increased.

Support for the granting of any such allowances is not rooted in any provision of the Bankruptcy Act but in the broad rules of the common law and equity as established in the case law and preserved in New York State by Sec. 475 of the Judiciary Law, which confers upon an attorney a lien on a cause of action and any judgment or decree entered therein.

*In re Heinsheimer,* 214 N. Y. 361, 364.

The proceeding to establish and impress an attorney's lien is in no sense a motion in the reorganization proceeding of Prudence Bonds Corporation, Debtor, nor in the subsequent accounting proceedings, but it is a separate special proceeding.

*Smith* v. *First National Bank of Albany,* 103 Misc. 274, 170 N. Y. S. 127, Modified in 184 App. Div. 719, 172 N. Y. S. 595.

The establishment of an attorney's charging lien, and the awarding of costs as between solicitor and client and other parties to a proceeding has long been a recognized right in the Federal Courts. In the case of *Sprague* v. *Ticonic Bank,* 307 U. S. 161, the Court says:

> The allowance of such costs in appropriate situations is part of the historic equity jurisdiction in federal courts. The suits 'in equity' of which these courts were given 'cognizance' ever since the First Judiciary Act, constituted that body of remedies, procedures and practices which theretofore have been evolved in the

> English Court of Chancery, subject, of course, to modifications by Congress, * * * To be sure, the usual case is one where through the complainant's efforts a fund is recovered in which others share. * * *

*d.*

The case of *Dickinson* v. *Cowan*, 309 U. S. 382, involved a case where allowances were made for services rendered in a bankruptcy reorganization proceeding, and it was there held that an appeal from such an allowance could only be had when allowed in the discretion of the Circuit Court of Appeals within the meaning of Section 250 of the Bankruptcy Act. Section 250 of said Act creates an exception to the general rule whereby it was sought to unify the practice, so that appeals are taken by the service of a notice of appeal. The section applies only to appeals from orders granting allowances for services rendered in a reorganization proceeding and was intended to afford a prompt and summary disposition of a question of allowances in such proceeding so as not to delay the administration of the estate. It has no application to the case at bar, where, as pointed out above, the awards of compensation appealed from are not grounded upon any provisions of the Bankruptcy Act.

POINT II.

**The reorganization trustees had no interest in the trust estates involved in the accountings; therefore, any award to them and their counsel, chargeable to the trust fund, is, as matter of law, beyond the power and jurisdiction of the court and is indefensible.**

The bondholders, the only parties beneficially interested in the funds created as a result of the accounting proceedings below, did not authorize or empower the reorganization trustees to appear in their behalf, or to engage counsel

in their behalf, and thereby impliedly agree to compensate said trustees and their counsel out of such funds as may be realized through their services; nor is there any statutory authority conferred upon the reorganization trustees to so appear for and prosecute the claims of the bondholders. The bondholders had and exercised the right to appear themselves by counsel of their own choosing. Allowances can only be awarded to a real party in interest, and his counsel, when the party seeking the allowance has a *joint* interest with others in a *common* fund. If the party has no interest in the common fund, neither he nor his counsel should receive compensation payable therefrom.

*Manufacturer's Trust Co.* v. *Kelby,* 125 F. (2d) 650;
*Trustees* v. *Greenough,* 105 U. S. S. 527;
*Central R. R. Co.* v. *Pettus,* 113 U. S. 116;
*In re Gillespie,* 190 Fed. 88.

The principle governing the allowance of compensation to parties or their attorneys, payable out of funds belonging to others, is succinctly stated in *Trustees* v. *Greenough,* 105 U. S. 527, in the following language:

> One *jointly interested* with others in a *common fund* who, in good faith maintains necessary litigation to save it from waste, and secure its proper application, is entitled in equity to the reimbursement of his costs, as between solicitor and client, either out of the fund itself, or by proportionate contribution from those who receive the benefit of the litigation. (Emphasis ours.)

*In re Gillespie,* 190 Fed. 88, the Court said:

> The only proper case where a court of equity or bankruptcy can award compensation to an attorney out of funds due to others than his client is where the attorney of a class has created or secured a fund and brought it into the custody of the Court which is to enure *not only to the benefit of his client,* but to others belonging to the class. (Emphasis ours.)

The funds realized in the accounting proceedings below, do not enure to the benefit of the reorganization trustees but solely to that of the bondholders. The reorganization trustees are not members of a class to whose benefit the funds created enure. They were not the substituted trustees and were not beneficiaries of the Trust Estates and had no derivative right to contest the accountings.

*Hart* v. *Goadby,* 138 App. Div. 160; 123 N. Y. S. 126.

*Hart* v. *Goadby,* 138 App. Div. 160; 123 N. Y. S. 126. Consequently, the allowances to the reorganization trustees in the sums of $22,623 and $500, and to their attorney in the sum of $32,500, deprives the trust estates in which the bondholders are the sole beneficiaries of the sum of $55,635, contrary to law and without due process of law.

## Point III.

**Assuming Section 250 of the Bankruptcy Act is applicable in the case at bar, the Circuit Court abused its discretion in denying petitioners' application for an allowance of an appeal.**

The District Court, in awarding allowances recompensed parties who had no interest or right to share in the subject matter of the litigation and erroneously accorded to the real parties in interest a relatively minor role. This is obviously contrary to law. *Trustees* v. *Greenough,* 105 U. S. 527, and other cases cited in Point II above.

There is a flagrant inconsistency in awarding $55,635 to parties and their counsel when they have no status in the proceedings, and allowing but $6,000 to counsel for bondholders who are the real interested parties. This inconsistency afforded a basis for a review of the decisions of the District Court on the merits, and for the Circuit Court in its discretion to have allowed petitioners to appeal.

**Conclusion.**

*The petition for writs of certiorari should be granted.*
Dated: New York, April 5, 1943.

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